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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

EBONY FREEMAN et al.,

Plaintiffs and Appellants,

v.

FROEHLICH SIGNATURE HOMES, INC.,

Defendant and Respondent.

F073374

(Super. Ct. No. BCV-15-100078)

**OPINION**

APPEAL from an order of the Superior Court of Kern County. Sidney P. Chapin, Judge.

Kasdan LippSmith Weber Turner, Michael D. Turner and Bryan M. Zuetel for Plaintiffs and Appellants.

Heath & Yuen, Stephen B. Heath, Steven W. Yuen and Joshua G. Wong; Lee, Hernandez, Landrum & Garofalo, David S. Lee, John R. Marking and Charles D. Lawrence for Defendant and Respondent.

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Appellants are plaintiffs in a construction defect lawsuit against respondent, Froehlich Signature Homes, Inc. (Froehlich). The Declaration of Covenants, Conditions and Restrictions and Reservation of Easements (CC&R's) for the subject housing development requires that disputes be resolved by judicial reference but, if "for any reason the judicial reference procedures ... are legally unavailable at the time a dispute would otherwise be referred to judicial reference, then such dispute shall be submitted to binding arbitration ...."

Appellants moved to compel judicial reference under the CC&R's. The trial court denied the motion without prejudice on the ground that there was another pending case involving the same development project, types of claims and issues, that "negatively impacts judicial economy, court efficiencies and raises threats of inconsistent rulings."

Thereafter, appellants moved to compel arbitration arguing that the judicial reference procedures were "legally unavailable." The trial court denied the motion without prejudice "as premature." The court explained "There is no determination that judicial reference is 'legally unavailable,' a condition precedent to the availability of arbitration." The court noted that motions for judicial reference and, when appropriate, motions to compel arbitration, could be renoticed. The trial court then consolidated the three cases involving alleged construction defects in the development "for purposes of case management, law and motion, monitoring, determination of alternative dispute resolution processes, and consolidation for trial."

Appellants challenge the denial of their motion to compel arbitration arguing that, under the CC&R's, they are entitled to binding arbitration because the trial court's earlier ruling denying their motion to compel judicial reference made that procedure "legally unavailable." However, that denial was without prejudice and the consolidation changed the conditions for judicial reference. Therefore, the order will be affirmed.

## DISCUSSION

### 1. *Standard of review.*

The evidence relevant to the trial court's denial of appellants' motion to compel arbitration is not in conflict. Therefore, we review that ruling de novo. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236 (*Pinnacle*).)

### 2. *Froehlich is subject to the CC&R's.*

The original builder and declarant under the CC&R's was Lennar Homes of California, Inc. The CC&R's provide that declarant refers to Lennar Homes "and its successors and assigns, if such successors or assigns should acquire more than one (1) undeveloped Lot from Declarant for the purpose of development, and are designated by Declarant as the Declarant for the purpose hereof by a duly recorded written instrument."

Froehlich acquired more than one lot through Lennar Homes. Nevertheless, Froehlich contends there is no evidence that it is subject to the CC&R's and therefore appellants did not meet their burden of showing that the CC&R's apply here.

However, Froehlich did not raise this defense in the trial court. Moreover, the grant deeds submitted by appellants<sup>1</sup> demonstrate that when Froehlich took title to the undeveloped lots it did so subject to the CC&R's. Each deed states that the grant includes "[n]on-exclusive easements for access, ingress, egress, use, enjoyment, drainage, encroachment, support, maintenance, repairs and for other purposes, all as described in the declaration, recorded December 28, 2006, as Instrument No. 0206317890, Official Records." This declaration is the CC&R's. Thus, Froehlich became the declarant under the CC&R's. Further, when Froehlich deeded the property to the original purchasers, it bound those purchasers to the CC&R's as well.

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<sup>1</sup> Appellants' request that we judicially notice the submitted deeds is granted.

### **3.     *The Federal Arbitration Act applies.***

“In California, ‘[g]eneral principles of contract law determine whether the parties have entered a binding agreement to arbitrate.’” (*Pinnacle, supra*, 55 Cal.4th at p. 236.) Thus, the interpretation of the arbitration agreement is governed by the mutual intent of the parties. This intent is found, if possible, solely in the agreement’s written provisions. (*Gloster v. Sonic Automotive, Inc.* (2014) 226 Cal.App.4th 438, 447 (*Gloster*).) “The party seeking arbitration bears the burden of proving the existence of an arbitration agreement, and the party opposing arbitration bears the burden of proving any defense.” (*Pinnacle, supra*, at p. 236.)

The Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.), when applicable, preempts all state laws that conflict with its provisions or its objective of enforcing arbitration agreements. (*Pinnacle, supra*, 55 Cal.4th at p. 235.) The FAA “stands as ‘a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.’” (*Ibid.*)

Froehlich argues the FAA does not apply here because the contract does not involve interstate commerce. Therefore, Froehlich contends, the trial court had discretion under Code of Civil Procedure section 1281.2, subdivision (c), to not order arbitration because there was pending litigation involving a third party and there was a possibility of conflicting rulings on a common issue of law or fact.

Froehlich correctly notes that the FAA applies to contracts that involve interstate commerce. (*Woolls v. Superior Court* (2005) 127 Cal.App.4th 197, 212.) However, because arbitration is a matter of contract, the FAA also applies if it is so stated in the agreement. (*Gloster, supra*, 226 Cal.App.4th at pp. 446-447.)

The CC&R’s provide that the “binding arbitration procedures” are implemented “in accordance with the philosophy and intent of” the FAA and “are to be interpreted and enforced as authorized by the FAA. Parties interpreting this Section shall follow the federal court rulings, which provide among other things that: (1) the FAA is a

congressional declaration of liberal federal policy favoring alternate dispute resolution notwithstanding substantive or procedural state policies or laws to the contrary; (2) alternate dispute resolution agreements are to be rigorously enforced by state courts; and (3) the scope of issues subject to alternate dispute resolution are to be interpreted in favor of alternate dispute resolution.” Thus, the clear intent of the CC&R’s is that the FAA apply. Because the FAA does not include a provision comparable to Code of Civil Procedure section 1281.2, subdivision (c), it requires courts to enforce written arbitration agreements even if there is pending litigation involving a third party that may result in conflicting rulings. (*Acquire II, Ltd. v. Colton Real Estate Group* (2013) 213 Cal.App.4th 959, 968.)

**4. *The trial court did not err when it denied the motion to compel arbitration.***

As noted above, the CC&R’s provide that disputes shall be resolved by judicial reference. However, even when there is a valid reference agreement, the trial court has discretion to deny a motion to compel the judicial reference based on the risk of inconsistent rulings and considerations of judicial economy. (*Tarrant Bell Property, LLC v. Superior Court* (2011) 51 Cal.4th 538, 544.) That is what the trial court did here.

The CC&R’s further state that “[i]f for any reason the judicial reference procedures ... are legally unavailable at the time a dispute would otherwise be referred to judicial reference, then such dispute shall be submitted to binding arbitration.” Thus, the issue is whether the judicial reference procedures became “legally unavailable” when the trial court denied the motion to compel the judicial reference.

The trial court denied the motion to compel the judicial reference without prejudice. The trial court also set an order to show cause for all parties in the three related cases on why the court should not order consolidation of these cases.

This order to show cause was heard on the same day as appellants’ motion to compel arbitration. The trial court ordered the cases consolidated for various purposes including “determination of appropriate alternative dispute resolution processes.” The

court also noted that “motions for judicial reference, and when appropriate, motions [to] compel arbitration may be renoticed.”

This consolidation reduced the risk of inconsistent rulings and judicial inefficiency in that only one judicial reference, arbitration or trial will be necessary to resolve the matter. Accordingly, the trial court correctly concluded that, because judicial reference had not been determined to be “legally unavailable,” appellants’ motion to compel arbitration was premature.

### **DISPOSITION**

The order is affirmed. Costs on appeal are awarded to respondent.

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LEVY, Acting P.J.

WE CONCUR:

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GOMES, J.

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KANE, J.